

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

***DOUGLAS DYNAMICS, LLC, d/b/a
FISHER ENGINEERING,***

Plaintiff

v.

TUCK'S TRUCKS, INC.,

Defendant

Docket No. 00-373-P-H

***RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE
OR, IN THE ALTERNATIVE, TO TRANSFER VENUE***

Tuck's Trucks, Inc. ("Tuck's") moves to dismiss the instant declaratory judgment action pursuant to Fed. R. Civ. P. 12(b)(2) and (3) for lack of personal jurisdiction and improper venue or, alternatively, to transfer venue to the United States District Court for the District of Massachusetts where an earlier filed action addressing the same subject matter is pending. Motion to Dismiss Pursuant to Rules 12(b)2, 12(b)3 or, in the alternative to Transfer to the District of Massachusetts ("Motion") (Docket No. 2) at 1.¹ For the reasons discussed below, I recommend that the Motion be granted and that the case be dismissed on the basis of lack of personal jurisdiction. I do not reach Tuck's alternative grounds.

I. Applicable Legal Standards

¹ The District Court for the District of Massachusetts stayed all proceedings in the related case pending the outcome of the instant motion. Order on Defendant's Motion To Transfer Venue, *Boyle v. Douglas Dynamics, LLC, Fisher Plows Div.*, Civil Action No. 00-12629-RGS (D. Mass. Feb. 7, 2001), attached to Letter dated February 13, 2001 from Peter S. Black to William S. Brownell, *(continued on next page)*

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has “purposefully established minimum contacts in the forum State.” *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices. *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff’s pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*

II. Factual Background

The following facts, with conflicts resolved in favor of the plaintiff’s properly supported proffers of evidence, are relevant to a consideration of the pending motion.

The Fisher Engineering Division of Douglas Dynamics, LLC (“Fisher”) is located in Rockland, Maine. Affidavit of John Murphy in Support of Plaintiff’s Objection, etc. (“Murphy Aff.”) (Docket No. 5) ¶ 1.² Fisher manufactures and sells snow-removal equipment, including snow plows, at its Rockland facility, shipping equipment to its customers, including Tuck’s and J.C. Madigan (“Madigan”), FOB Rockland, Maine. *Id.* ¶ 3. Fisher enters into relationships with distributors that are at-will arrangements, terminable by either party at any time, subject to applicable state statutes. *Id.* ¶ 4. Distributors generally sign a code of ethics and execute a security agreement, a resale tax certificate and a Uniform Commercial Code Financing Statement (“UCC-1”). *Id.*

Clerk (Docket No. 6).

² Douglas Dynamics, LLC is a Delaware corporation with offices in Tennessee. Complaint (Jury Trial Demanded) (“Complaint”) (Docket No. 1) ¶ 2.

Prior to October 1, 1997 Tuck's Truck Sales, Inc. of Hudson, Massachusetts was a Fisher distributor. *Id.* ¶ 5. In 1997, Fisher learned that the company was interested in selling its truck business. *Id.* On several occasions beginning in spring 1997, Fisher advised Tuck's Truck Sales, Inc. that it had no right to transfer any interest in the distribution of Fisher products as part of the sale of its assets. *Id.* Tuck's purchased the assets of Tuck's Trucks Sales, Inc. Exh. A to *id.*

In September 1997 Tuck's applied to become a new Fisher distributor, sending a letter and credit request to Fisher in Rockland, Maine. Murphy Aff. ¶ 6 & Exh. A thereto. Fisher approved the credit request and approved Tuck's as a distributor as of October 7, 1997. Murphy Aff. ¶ 7. On that date, Tuck's executed the Fisher code of ethics, security agreement, UCC-1 and resale tax certificate. *Id.* Those documents were signed in Massachusetts by James G. Boyle, president of Tuck's. Affidavit of James G. Boyle Concerning Jurisdiction ("Boyle Aff.") (Docket No. 3) ¶¶ 1, 13, 18. The security agreement provided that it was to be governed by the laws of Maine, and the UCC-1 was a Maine form. Exh. B to Murphy Aff.

Prior to October 1, 1997 Madigan, of Ayer, Massachusetts, was a pool distributor of Fisher snow-removal equipment and was Tuck's largest customer. Murphy Aff. ¶ 12; Boyle Aff. ¶ 9. A pool distributor accepts vehicles from a manufacturer, equips them with designated equipment (such as plows) and delivers them to truck and automobile dealers authorized by the truck and automobile manufacturer. Murphy Aff. ¶ 12. A full distributor sells equipped vehicles and snow-removal equipment to the general public. *Id.* As of October 1, 1997 Madigan became a full distributor of Fisher equipment. *Id.*³

³ The Murphy Affidavit gives the date as "October 1, 1999"; however, this apparently is a typographical error. See Letter dated December 4, 2000 from Jeffrey M. White to John Kuzinevich, Esquire ("December 4 Letter"), attached as Exh. 6 to Plaintiff's Objection to Defendant's Motion, etc. ("Opposition") (Docket No. 4) (noting that Madigan was appointed a full distributor as of October 1, 1997).

After October 7, 1997 Fisher began supplying snow-removal equipment to Tuck's. *Id.* ¶ 8. Tuck's placed its larger orders by sending, usually by fax, a written order to Fisher's Rockland facility. *Id.* Tuck's also placed some smaller orders by calling the Rockland facility. *Id.* Fisher then shipped the goods FOB Rockland, Maine. *Id.* During the winter months, Tuck's typically has been sending one or more orders per business day to Maine. *Id.* ¶ 9. As of February 2, 2001 Fisher had filled more than three hundred and seventy orders from Tuck's. *Id.* Most of Tuck's orders required Fisher to specially assemble equipment components to suit Tuck's specific requirements. *Id.* ¶ 10. Tuck's often placed telephone calls to Fisher in Rockland to check the status of its orders and to ask technical questions. *Id.* In addition, for the past three and a half years, Tuck's has been sending equipment to Rockland for repair or replacement under warranty. *Id.*

In summer 2000 Boyle and Robert Camacho participated in a business meeting hosted by Fisher at the Rockland facility. *Id.* ¶ 11.⁴ They attended a presentation about a new Fisher factory that makes the plows Tuck's purchases, toured the factory, attended a training session to learn about a new CD-ROM system and attended a question-and-answer session about Fisher products. *Id.*⁵

By letter dated July 14, 2000 John Kuzinevich, counsel for Tuck's, wrote James Janik, president of Douglas Dynamics, LLC, in Milwaukee, Wisconsin, seeking information about Fisher's distributorship practices. Letter dated July 14, 2000 from John Kuzinevich to James Janik, attached as Exh. 1 to Opposition. By letter dated October 11, 2000 Kuzinevich advised Janik:

[T]his letter constitutes a demand that Fisher Engineering compensate Mr. Boyle for its unfair and deceptive treatment of him and for its interference with his largest customer, J.C. Madigan. At the time Mr. Boyle purchased Tuck's Trucks, J.C. Madigan was its largest customer. Fisher, without warning to Mr. Boyle and directly contrary to representations made to Tuck's, made J.C. Madigan a distributor effective

⁴ Robert Camacho is elsewhere described as a "parts manager" for Tuck's. *See* Exh. A to Murphy Aff.

⁵ Boyle characterizes this as merely a "social" visit, stating that he toured the plant but does not recall discussing any business issues or attending any workshops. Boyle Aff. ¶ 16. Boyle also states that Tuck's has never sent an employee or agent into Maine to conduct business. *Id.* ¶ 6. For purposes of the instant motion, Fisher's account of the summer 2000 meeting is accepted as true.

as of the purchase date of Tuck's Trucks. Not only did this have an immediate impact on the sales which had been made to Madigan (approximately 50% of Tuck's Trucks Fisher sales); it established a new competitor in the sales area covered by Tuck's Trucks.

Letter dated October 11, 2000 from John Kuzinevich to James Janik, President, attached as Exh. 3 to Opposition.⁶

Tuck's October 11, 2000 letter was referred to Maine counsel Jeffrey M. White, who wrote a letter dated November 6, 2000 taking issue with the accusations and requesting that future correspondence be directed to his attention. Letter dated November 6, 2000 from Jeffrey M. White to John Kuzinevich, Esquire, attached as Exh. 4 to Opposition. There was a further exchange of letters, with Kuzinevich corresponding with White by letter dated November 7, 2000, and White responding by letter dated December 4, 2000. Letter dated November 7, 2000 from John Kuzinevich to Jeffery [sic] White, attached as Exh. 5 to Opposition; December 4 Letter. In his December 4, 2000 letter, White noted *inter alia*:

... Mr. Boyle's Tuck's Trucks business became a Fisher distributor as of October 7, 1997. He was advised on that date, and prior to his signing the Code of Ethics, that J.C. Madigan had been appointed a full distributor as of October 1, 1997. Fisher representatives made no representations to Mr. Boyle at any time that J.C. Madigan would not become a full distributor of Fisher plows, and you have not identified any. Similarly, while you have made general assertions that some oral agreement was breached by the appointment of J.C. Madigan, no such agreement has ever been identified.

December 4 Letter at 1.⁷ By letter dated December 7, 2000 Kuzinevich repeated a question he had posed in his November 7, 2000 letter: whether White would accept service of process. Letter dated December 7, 2000 from John Kuzinevich to Jeffery [sic] White, attached as Exh. 7 to Opposition.

⁶ Janik had responded to Kuzinevich by letter dated July 31, 2000. Letter dated July 31, 2000 from James L. Janik to Mr. John Kuzinevich, Esquire, attached as Exh. 2 to Opposition.

⁷ White also addressed an allegation that Fisher had acted arbitrarily in denying Boyle a Fisher distributorship in connection with Boyle's purchase of a dealership in Methuen, Massachusetts. December 4 Letter at 1-2.

On December 13, 2000 the instant complaint was filed, invoking diversity jurisdiction and noting that Fisher sought a declaratory judgment “that its decision to appoint J.C. Madigan, Inc., of Ayer, Massachusetts, as a full distributor of Fisher® snow removal equipment, did not breach any agreement with, any representations to, or any other obligations of Fisher Engineering to Tuck’s Trucks, Inc.” Complaint ¶¶ 1, 5. Specifically, the Complaint noted that Tuck’s had asserted claims that Fisher’s appointment of Madigan as a full distributor “(i) breached an oral distributorship agreement between Tuck’s Trucks, Inc. and Fisher Engineering; (ii) breached representations allegedly made by Fisher Engineering to Tuck’s Trucks, Inc.; and (iii) was arbitrary and unreasonable.” *Id.* ¶ 13.

On December 18, 2000 Fisher received notice (via counsel) that Tuck’s had filed a lawsuit against it in Massachusetts. *Murphy Aff.* ¶ 13. Prior to that time, Fisher had no notice that any such lawsuit had been filed. *Id.* Fisher did not receive a copy of the complaint in that action until December 21, 2000. *Id.* That lawsuit, which had been filed in September 2000 in the Superior Court for Middlesex County, Massachusetts, sought “damages arising from the defendant’s bad faith and interference with the plaintiffs’ advantageous business relationship with its largest customer.” Complaint and Jury Demand, *Boyle v. Douglas Dynamics, LLC, Fisher Plows Div.*, Civil No. ____ (Mass. Super. Ct.) (“Massachusetts Complaint”), attached as Exh. 9 to Opposition, at 1; *Boyle Aff.* ¶ 22. The Massachusetts Complaint contained six counts, for breach of an oral contract entered into on or about October 7, 1997 (Count I); interference with contract (Count II); interference with advantageous relationship (Count III); deceptive or unfair trade practices in violation of Massachusetts law (Count IV); discouraging competition in violation of Massachusetts law (Count V) and misrepresentation (Count VI). *Massachusetts Complaint* ¶¶ 19-47. Upon learning of the existence of the Massachusetts case, Fisher immediately removed it to the District Court for the District of

Massachusetts and asked that the court transfer venue to the District of Maine. Opposition at 5.

All negotiations concerning the contract with Fisher that is the subject of this lawsuit or involving Madigan occurred in Massachusetts. Boyle Aff. ¶¶ 8-9. Fisher sent representatives to Massachusetts on several occasions to meet with Boyle prior to and at the time of reaching agreement with Fisher. *Id.* ¶ 10. Boyle does not recall whether he or anyone at Tuck’s initiated a call to Fisher in Maine concerning the negotiations or contract; if so, any such call was not substantive and only would have concerned scheduling meetings in Massachusetts. *Id.* ¶ 11. The contract involved in this action if it existed was an oral contract entered into in Massachusetts in 1997 and governed by Massachusetts law. *Id.* ¶ 12.

Tuck’s has never owned property in Maine; does not solicit customers in Maine or offer products for sale there; to the best of Boyle’s knowledge has never sold a truck to a Maine customer; does not have an office in Maine; and is not registered to do business in Maine. *Id.* ¶¶ 3-5, 7. No employee of Tuck’s has gone to Maine to meet with Fisher for training. *Id.* ¶ 17. Tuck’s has never availed itself of the protection of Maine and its courts. *Id.* ¶ 19.

III. Analysis

A federal court sitting in diversity must both apply the law of the forum state to determine whether it may exercise jurisdiction over the person of a non-resident defendant and satisfy itself that such an exercise will not offend due process. *See, e.g., Archibald*, 826 F. Supp. at 28. Maine declares that its long-arm jurisdiction statute is to be applied “so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States

Constitution, 14th amendment,” 14 M.R.S.A. ' 704-A(1); accordingly, in this case the two analyses meld into one, *see Archibald*, 826 F. Supp. at 28-29.

At issue here is so-called “specific jurisdiction,” which comes into play when “the cause of action arises directly out of, or relates to, the defendant’s forum-based contacts.” *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992).⁸ The exercise of such jurisdiction comports with the dictates of constitutional due process if a tripartite test is satisfied:

First, the claim underlying the litigation must directly arise out of, or relate to, the defendant’s forum-state activities. Second, the defendant’s in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state’s laws and making the defendant’s involuntary presence before the state’s courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

163 Pleasant St., 960 F.2d at 1089.⁹

Tuck’s argues *inter alia*, and I agree, that its Maine contacts are not sufficiently related to the instant action to sustain personal jurisdiction. *See* Motion at [4]. The touchstone of “relatedness” is that “the defendant’s in-state conduct must form an important, or [at least] material, element of proof in the plaintiff’s case.” *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999) (citations and internal quotation marks omitted). “The relatedness requirement is not met merely because a plaintiff’s cause of action arose out of the general relationship between the parties;

⁸ Fisher does not contend that the court possesses “general jurisdiction” over Tuck’s — a type of jurisdiction predicated on the defendant’s having engaged in substantial or systematic and continuous activity, not necessarily related to the subject matter of the action, in the forum state. *See* Opposition at 6 (citing test for specific jurisdiction as “applicable law”); *Scott v. Jones*, 984 F. Supp. 37, 43 (D. Me. 1997).

⁹ The “Gestalt factors” are “(1) the defendant’s burden of appearing, (2) the forum state’s interest in adjudicating the dispute, (3) the plaintiff’s interest in obtaining convenient and effective relief, (4) the judicial system’s interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.” *163 Pleasant St.*, 960 F.2d at 1088.

rather, the action must arise directly out of the specific contacts between the defendant and the forum state.” *Scott*, 984 F. Supp. at 44 (citation and internal quotation marks omitted).

“In contract cases, a court charged with determining the existence *vel non* of personal jurisdiction must look to the elements of the cause of action and ask whether the defendant’s contacts with the forum were instrumental either in the formation of the contract or in its breach.” *Phillips Exeter*, 196 F.3d at 289. Although “there is a natural blurring of the relatedness and purposeful availment inquiries in cases (like this one) in which the alleged contacts are less tangible than physical presence . . . the inquiries are different[.]” *Id.*

Fisher demonstrates the existence of numerous contacts between Tuck’s and Maine, to wit: (i) Boyle’s initial letter to Fisher in Maine seeking a distributorship, (ii) the execution of documents in October 1997 establishing a relationship, including a security agreement that was to be governed by the laws of Maine and a Maine UCC-1 form, (iii) Tuck’s continuous placement to Fisher in Maine of orders for Maine-made equipment over a three-and-half-year period, (iv) Fisher’s corresponding shipment FOB Maine of hundreds of pieces of equipment to Tuck’s; (v) the honoring by Fisher in Maine of warranties on equipment sold to Tuck’s; (vi) a business-related visit by Boyle and Camacho in July 2000 to Fisher’s Rockland facility, and (vii) the addressing of some correspondence concerning the instant dispute to Fisher’s attorney in Maine.

Nonetheless, the instant action centers on an alleged oral promise made by a Fisher sales representative to Boyle during a sales visit to Massachusetts at the inception of the parties’ relationship. Fisher allegedly promised that it would not award a full-fledged distributorship to Tuck’s largest customer, Madigan. Such a distributorship was in fact awarded to Madigan effective October 1, 1997.

Although the establishment of the basic distributorship agreement between Tuck's and Fisher provides essential backdrop to the controversy between the parties, no breach of any of the foundational documents (*e.g.*, the security agreement, the Code of Ethics) is claimed. Nor is the parties' subsequent course of dealing (the ordering, shipping and repair of equipment and the July 2000 visit to Maine) material to the instant claim. This conduct not only postdated the formation and breach of the alleged oral representation, but also touched on areas of the parties' dealings as to which, inasmuch as the record reveals, there is no dispute. For example, Tuck's is not claiming that the equipment is defective or in some other way less than satisfactory, and Fisher is not claiming that Tuck's has failed to pay for it.

While Tuck's did indeed address some correspondence concerning the instant dispute to Fisher's attorney in Maine, the mere mailing of letters threatening litigation is insufficient to confer personal jurisdiction. *See, e.g., Talus Corp. v. Browne*, 775 F. Supp. 23, 28 (D. Me. 1991) ("Courts have noted that the type of contact that Defendant had with the forum state — notice-of-infringement letters — standing alone, does not meet the constitutional due process standard for personal jurisdiction."). In addition, Fisher fails to demonstrate that the correspondence in issue is "related" to the underlying dispute in the sense that it would form a material or important element of (as opposed to a backdrop for) Tuck's case. In any event, the record reveals that Tuck's chose to address correspondence concerning the instant dispute to Janik in Wisconsin, sending correspondence to Fisher's attorney in Maine only after directed by that attorney to do so.

Fisher struggles to find "relatedness" in Tuck's contacts, arguing *inter alia*:

- Jurisdiction has been found on fewer contacts than are presented here. Opposition at 8 (citing *Vencedor Mfg. Co. v. Gougler Indus., Inc.*, 557 F.2d 886, 892 (1st Cir. 1977); *Unicomp, Inc. v. Harcros Pigments, Inc.*, 994 F. Supp. 24, 28 (D. Me. 1998)). These cases are distinguishable. The

Vencedor suit arose from the parties' purchaser-supplier relationship specifically, sale of an allegedly defective extruder. *Vencedor*, 557 F.2d at 888-89. In *Unicomp*, the alleged injury flowed directly from the purchase of pigments placed in the stream of commerce via a distributor known to serve the Maine market. *Unicomp*, 994 F. Supp. at 25-26 ("The Court determines that an alleged injury from the sale of a product in a forum targeted by the manufacturer through its choice of distributors is sufficiently foreseeable to satisfy the relatedness prong of the jurisdictional inquiry.").

- Tuck's Maine contacts are related to the instant action inasmuch as the Complaint seeks a declaratory judgment that Fisher has not violated any of its obligations to Tuck's during the course of the parties' equipment-supply relationship. Opposition at 9. However, the Complaint focuses on the alleged representations concerning Madigan, with Fisher seeking a declaratory judgment "that its decision to appoint J.C. Madigan, Inc., of Ayer, Massachusetts, as a full distributor of Fisher® snow removal equipment, did not breach any agreement with, any representations to, or any other obligations of Fisher Engineering to Tuck's Trucks, Inc." Complaint ¶ 1.

- Some communications sent by Tuck's counsel to Maine touch on the very concerns and allegations that prompted Fisher to file for declaratory judgment concerns that are also referred to by Tuck's in the Massachusetts Complaint. Opposition at 9. For the reasons discussed above, these contacts are of marginal relevance to the "relatedness" inquiry.

- The supplier-purchaser relationship is the very subject of the Complaint. Opposition at 10. For the reasons discussed above, the parties' actual purchasing relationship is incidental to the subject matter of the Complaint.

Fisher's failure to demonstrate the relatedness of Tuck's contacts with Maine to the instant dispute ends the analysis. Under such circumstances, the exercise of personal jurisdiction does not comport with due process. *See Scott*, 984 F. Supp. at 43 ("These three factors relatedness,

purposefulness, and reasonableness must be satisfied for a court to exercise specific jurisdiction over a defendant.”).

IV. Conclusion

For the foregoing reasons, I recommend that the Motion be **GRANTED** and that the instant action be dismissed for lack of personal jurisdiction.¹⁰

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ‘ 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 7th day of March, 2001.

David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-373

DOUGLAS DYNAMICS LLC v. TUCK'S TRUCKS INC
Assigned to: JUDGE D. BROCK HORNBY
Demand: \$0,000

Filed: 12/13/00
Jury demand: Plaintiff
Nature of Suit: 190

¹⁰ I have considered recommending that this case be transferred to the District Court for the District of Massachusetts. However, Tuck’s seeks dismissal, not transfer, based on lack of personal jurisdiction. In addition, this case appears merely to anticipate, and to be duplicative of, the claims filed in Massachusetts, as a result of which no useful purpose would be served by transfer.

Lead Docket: None
Dkt# in other court: None

Jurisdiction: Diversity

Cause: 28:1332 Diversity-Breach of Contract

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